STATE OF MAINE
PUBLIC UTILITIES COMMISSION

February 26, 2001

ORDER

BANGOR GAS COMPANY, LLC,
Application for Approval of Affiliated Transaction with Sempra Energy Trading Company and/or For Waiver or Exemption
(35-A M.R.S.A. § 707)

Docket No. 2000-938

BANGOR GAS COMPANY, LLC,
Proposed Cost of Gas Adjustment
(§4703)

Docket No. 2000-697

Welch, Chairman; Nugent and Diamond, Commissioners

I. SUMMARY

We approve Bangor Gas Company, LLC's (BGC or Bangor Gas) proposed gas supply contract with its affiliate, Sempra Energy Trading Company (Sempra Energy). We find that no further adjustment to Bangor Gas's cost of gas adjustment (CGA) or tariffed Energy Charge is warranted this winter season. We also approve modification of Bangor Gas's rate schedule to include a statement alerting customers that the energy charge is only an estimate and may vary, but still require Bangor Gas to take other steps necessary to ensure its potential customers understand its charges.

II. PROCEDURAL HISTORY

On November 20, 2000, Bangor Gas filed for approval of a proposed gas supply contract with its affiliate, Sempra Energy, as required by 35-A M.R.S.A. §707. In addition, Bangor Gas filed this proposed contract in Docket No. 2000-697 in compliance with the Commission's Order in that case. *Bangor Gas Company, LLC, Proposed Cost of Gas Adjustment,* Docket No. 2000-697, Order (Oct. 24, 2000) at 6.

In Docket No. 2000-697, we approved a winter cost of gas charge for Bangor Gas based on the price projections for gas futures as of October 24, 2000. We required Bangor Gas to file any gas supply contract it entered into and to state its view as to whether the CGA should be modified to reflect the terms of the contract. In a letter accompanying its contract filing, Bangor Gas stated that it did not propose to adjust the CGA rate because of the short term of the contract and the fact that the gas prices under the contract are set by an objective index. Bangor Gas asserts that the contract terms do not differ materially from those anticipated at the time the CGA rate was established. Therefore, Bangor Gas argues that no change is warranted.

At the time of its filing, Bangor Gas requested that the gas supply contract be protected from public disclosure because it contained highly proprietary information, including projected load, terms of gas purchases, and negotiated arrangements concerning gas pricing. Bangor Gas also contends that the contract was negotiated in a highly competitive environment, both with respect to the provider of gas supplies and the local distribution company (LDC) and that a protective order is necessary to prevent this sensitive information from being used by competitors or potential competitors. On December 12, 2000, the Hearing Examiner issued Temporary Protective Order No. 1 in both Docket Nos. 2000-938 and 2000-697 to afford the gas supply contract confidential treatment.

Finally, in its application, Bangor Gas requested either approval of the contract, or an exemption from or waiver of the approval requirements of 35-A M.R.S.A. § 707(3). On December 18, 2000, in response to a Hearing Examiner request for clarification, Bangor Gas indicated that it needed authority to proceed under the contract that week.

The Hearing Examiner issued a Notice of Proceeding setting an intervention deadline and scheduling an initial case conference for December 21, 2000.[1] Sprague Energy Corporation (Sprague), the Office of the Public Advocate (OPA), and Maine Natural Gas (MNG) filed timely petitions to intervene. Bangor Gas objected to Sprague's intervention and the issues Sprague sought to raise. OPA supported Sprague's intervention.

On December 22, 2000, we issued an Order granting Bangor Gas a 60-day exemption from the approval requirements of section 707 pursuant to section 707(3)(F). On January 9, 2001, we amended the effective date of the 60-day exemption, and established February 16, 2001 as the date by which a final ruling on the contract was required.

Advisory Staff issued Data Request No. 1 to the Company on December 11, 2000. Bangor Gas filed responses on December 19, 2000.

The Hearing Examiner granted the interventions of OPA, Sprague, and MNG with certain limitations and established that the proceeding would focus on the particular affiliate dealings and contract terms involved in the filing, and not with "generic" affiliate gas supply contracting policies.

The Commission issued an Examiner's Report on February 1, 2001. Sprague filed exceptions on February 8, 2001.

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[1] The conference was later rescheduled at the request of Sprague Energy and was held on to January 4, 2001.

III. LEGAL STANDARDS

Section 707(3) of 35-A M.R.S.A. prohibits a public utility from making any contract or arrangement for furnishing services with an affiliated interest until the Commission finds that the arrangement is not adverse to the public interest and gives the contract or arrangement its written approval. Section 707(3)(F) allows the Commission, for good cause, to exempt arrangements from prior approval requirements for a period not to exceed 60 days, provided the Commission thereafter approves or disapproves the arrangement pursuant to section 707. Sections 4703 and 4706(8) of Title 35-A and Chapter 430 of the Commission's rules govern gas utility cost of gas adjustments.

IV. GAS SUPPLY CONTRACT

A. Bangor Gas Position

Bangor Gas seeks approval of a proposed gas supply contract with its affiliate, Sempra Energy Trading Company. The contract covers the gas requirements of BGC for the 6-month winter period.

In Docket 2000-697, BGC's 2000-2001 winter period cost of gas adjustment proceeding, we approved BGC's proposal that its tariffed gas cost be set at a proxy based upon a forecast of average natural gas futures prices reported in the Wall Street Journal plus an adder based on the difference between the Tennessee Zone 6 and NYMEX prices for the winter of 1999-2000.[2] At that time, BGC had not entered into a gas supply contract but anticipated that it would ultimately do so, for gas purchases to be priced according to an index.

In an affidavit filed in this proceeding, Rodger Schwecke, General Manager and Vice President of Bangor Gas, states, "the contract with Sempra Energy Trading uses the same gas supply index that was suggested by BGC's cost of gas filing for day-to-day supplies. The contract also allows for some first-of-the-month supply pricing at BGC's discretion." Affidavit at 2.

Mr. Schwecke also states that BGC contacted eight potential suppliers but only two were interested in, and capable of, supplying BGC's needs. He attributes this relative lack of interest in bidding to a number of factors: the short period of the contract, small loads during the period, a lack of firm contractual commitments by some companies on the Maritimes & Northeast Pipeline (MNE) system, and potential changes in supply requirements over the contract period. Of the two firms that expressed an

[2] This represents the market price of gas delivered through the Tennessee pipeline in New England.

interest, BGC concluded that Sempra Energy was the more economical and viable choice.

B. Analysis

The standard to approve affiliate contracts is whether the proposed arrangement is adverse to the public interest, which commonly devolves to the question of whether the utility has departed from its typical procedures of seeking the lowest cost qualified provider because of the affiliate relationship. In this case, BGC argues that Sempra's having competed against other suppliers demonstrates that the Sempra contract is superior to the available alternatives and therefore should be approved. As long as the competition between the affiliate and the other suppliers was vigorous, the logic of the argument is persuasive. BGC also argues that pricing the supply on an appropriate regional index provides additional assurance that the terms of the transaction are objective and fair.

Intervener Sprague, self-described as a potential bidder/marketer of natural gas to BGC, opposes BGC's proposed affiliate transaction. In doing so, it urges the Commission not to allow BGC to purchase gas from an affiliate until such time as procedures are put in place by the Commission to govern and ensure a fair and equitable bidding process and lowest cost result.[3] Our review includes the questions of whether the bidding process was competitively fair and whether the contract results in reasonable gas costs.

Mr. Schwecke indicated that BGC solicited proposals for gas supply through telephone contact with all firms registered with this Commission to supply gas in Maine or which had direct contractual rights to capacity on the MNE interstate pipeline.[4] He did not attempt to determine whether there were other potential suppliers who had purchased rights over MNE from someone who had direct rights. Interestingly, he did not solicit an offer from Sprague Energy, even though he states in his affidavit that BGC had previously received an offer from Sprague and even though Sprague had stated its potential interest in bidding on the supply contract in the CGA proceeding in September.

[3] Sprague sought to provide evidence on industry standards with which the Commission might establish such procedures. However, the Hearing Examiner limited the scope of this proceeding to "a review of BGC's efforts to seek a gas supply arrangement from non-affiliates as well as affiliates and the standards by which it evaluated the costs of this affiliated arrangement to ascertain whether the arrangement is in the public interest." See Procedural Order – Examiner's Rulings on Petitions to Intervene and Scope, Jan. 3, 2001.

[4] Sprague Energy was not listed on the Commission's retail gas supplier list at that time.

Notably, however, Sprague also made no further attempt to pursue a possible gas supply arrangement with BGC.

During the technical conference, in response to questions on his choice to use telephone contact rather than a written communication with potential gas suppliers, Mr. Schwecke indicated that telephone contact was common industry practice for the purchase of small quantities of gas. Sprague disagreed that it was appropriate when several months' gas supply was at issue. BGC defended its approach on the ground that the total purchase amount was minimal and unpredictable. In fact, Mr. Schwecke contended that the start-up load was so minimal as to be unattractive to most gas suppliers and that BGC actually benefited by having an affiliate available which might extend itself, more than many market participants, due to affiliation.

While we believe that the terms of the proposed gas supply arrangement are reasonable, we are concerned about the limited breadth of BGC's solicitation of potential suppliers. It is far preferable to rely on a fully competitive solicitation of non-affiliated suppliers in determining the reasonableness of contracts of this nature. Given the short term of the contract and the relatively small quantities of gas that will be purchased, we accept BGC's explanation for the limited amount of competitive interest in this transaction. We accept BGC's justification for its method of choosing which gas suppliers would receive their solicitation in this instance, though arguably BGC should have contacted Sprague to determine its interest and qualifications to submit a proposal. Certainly, had Sprague more actively sought to be included, BGC's omission would not withstand scrutiny.

We also find that the terms of the contract are reasonable and, in particular, that the price, which is based on market indices for the region, appears fair. Consequently, we approve this contract. We will, however, expect Bangor Gas to more thoroughly solicit potential gas suppliers when it seeks to develop future gas supply requirements contracts. It is important that BGC utilize a selection process that is fair to non-affiliated gas suppliers and openly competitive, both in appearance and in fact.

BGC stated that it fully intends to consider gas supply arrangements from non-affiliates as well as affiliates, particularly as its customer base grows. Mr. Schwecke testified that another recent Sempra start-up LDC located in North Carolina initially purchased gas supply from Sempra Energy but is now buying gas from a non-affiliate. This suggests that other suppliers would treat solicitations by BGC that include Sempra as still being realistic opportunities and that Sempra's subsidiary LDCs are free to take gas supply from non-affiliated entities should they find it advantageous.

We also take note of Sprague's concerns that rules and policies should be established by the Commission to govern competitive gas supplier bidding processes, to ensure they are fair, open, and obtain the best result for ratepayers.[5] We intend to further consider such issues as uniform codes of conduct, in our review of gas restructuring issues, to be the subject of a future investigation.

V. COST OF GAS/ENERGY CHARGE ADJUSTMENT

A. Bangor Gas's Position

In the Company's filing of November 17, 2000, it recommends not adjusting the CGA due to the short term of the contract and the fact that the terms of the contract do not differ materially from those envisioned in the existing tariff. In addition, Bangor Gas reasons that changing the CGA to reflect the current, higher natural gas futures prices is undesirable because of current highly volatile market conditions. They argue that it is not wise to change the rate in reaction to recent rapid price increases since price decreases could also occur, in turn requiring further adjustment.

Bangor Gas also suggests that because of the current natural gas market situation, with volatile prices, it is considering proposing that the Commission establish an alternative to the CGA that will better track actual market prices. Bangor Gas does not recommend adjusting the CGA this winter because the quantities that it expects to purchase will be very small compared to the quantities it expects to purchase next winter, and thus, any "negative or positive [gas cost account balance] will be very small."

In October 2000, we approved a CGA rate before the actual supply contract had been executed. We ordered Bangor Gas to file the contract when signed and to recommend whether the CGA should be adjusted to accurately reflect the terms of the contract. In data responses, Bangor Gas states that the "contracted prices for daily quantities are exactly as those described in the CGA proceeding. Therefore, [we] did not make any calculations to determine that the gas prices under the proposed contract do not differ materially from those used in the CGA proceeding."

B. Analysis

Bangor Gas asserts that no change in the current CGA, or its tariffed Energy Charges, is necessary because the terms of the contract are consistent with those underlying the approved rates, the contract is short term in nature, and the amount of gas that BGC will purchase this winter will be de minimis. We agree that the

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[5] Mr. Schwecke noted that, as a Sempra employee, he is used to complying with the strict affiliate transaction rules established in California. He provided a copy of these rules, at the request of the Examiner, for the information of the parties to this proceeding.

CGA does not have to be adjusted at this time to reflect the executed gas supply contract for the reasons given by Bangor Gas.

We also conclude that adjustment of the current rate is not warranted, despite more than a two-fold increase in the natural gas futures market prices since the rate was set in October 2000, because this difference is likely of small impact on Bangor Gas's ratepayers. Because BGC has a small customer base this winter, any under-collected revenue amounts should be relatively small and easily absorbed by BGC's larger, projected customer base next winter season. Moreover, while natural gas market prices increased dramatically after the Energy Charge was set, they have recently come down significantly.

However, we are interested in Bangor Gas's suggestion that it may wish to establish an alternative to its CGA at some time in the future. We encourage Bangor Gas to explore alternatives to its current CGA and to propose a mechanism to better track actual market prices, or to reduce regulatory oversight, should BGC conclude that any of the alternatives are superior to the current tariff.

VI. MARKETING

A. Bangor's Position

In the October 24, 2000 Order in Docket No. 2000-697, we directed BGC "to use care in its marketing efforts to ensure that customers understand that the CGA rate may change, possibly before they ever receive service, and that it will be adjusted to reconcile the company's over or under collections with its actual gas costs." The Commission also agreed with the OPA's comments that the language the Company uses to explain this should be clear and understandable to the public. Finally, we directed Bangor Gas to seek a waiver of this requirement for any marketing materials where the costs outweigh the benefits of compliance.

During discovery and at the technical conference, the parties explored whether this addition to the tariff was adequate to inform customers that energy charges would vary and also whether any other marketing materials required modification or waiver on this point.[6]

Bangor Gas proposes to comply with the requirement for marketing materials by amending its rate schedule, which BGC distributes to potential customers, to include the following statement:

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[6] Bangor Gas provided a copy of all of its marketing materials to the Commission as part of its Annual Report dated October 1, 2000.

> Bangor Gas estimates the Energy Charge portion of its tariff rate for the upcoming season to reflect future gas prices. The actual Energy Charge for a season will include a true-up factor in the next applicable season to ensure customers pay exactly the cost of gas incurred by the utility. The result is the cost to the customer may be above or below the estimated Energy Charge for that season.

B. Analysis

1. "Dear Neighbor" letter

In September 2000, Bangor Gas marketed gas through a letter to potential customers containing calculations of cost savings from conversion to natural gas heating use. The letter did not identify the date used to price the gas, or note that the cost of gas might change. Without language to this effect, the letter could mislead consumers. Consequently, if Bangor Gas uses this letter, or any similar cost comparison again, we require that the prices used be reference dated and that it contain language similar to the CGA schedule language indicating that prices may go up or down depending on actual market prices.

2. Rate schedule language

Bangor Gas proposes to comply with our order regarding its marketing material by inserting language describing its CGA in its tariff, which it regularly provides to prospective customers. We agree that this language will be a useful addition to the Company's tariff, although we do not conclude that it is the only means by which BGC is required to communicate the variable nature of its energy charge. We clarify the language to read as follows:

> Bangor Gas estimates, based on predicted gas prices, the Energy Charge portion of its tariff rate for the upcoming season (winter or summer). The actual Energy Charge for a season (winter or summer) will fluctuate with market prices. The actual costs could be higher or lower than the estimated costs. Differences between the actual costs and revenues collected (based on estimated costs) during a season (winter or summer) will be reflected in the next corresponding season's (winter or summer) Energy Charge, either increasing or decreasing it.

We direct Bangor Gas to submit revised CGA tariffs with this proposed language. However, we caution BGC that including the above change in its tariff does not relieve Bangor Gas of the full requirements in the Order in Docket No. 2000-697 (October 24, 2000). We continue to direct BGC to ensure, in any marketing or sales activity where specific rates are used, that customers understand that the CGA rate may change, possibly before they ever receive service, and that it will be adjusted to reconcile the Company's over-or under-collections with its actual gas costs. [7]

VII. GAS SUPPLY CONTRACT CONFIDENTIALITY

In this proceeding, Bangor Gas requested, and received under Temporary Protective Order, confidential protection for its gas supply contract with Sempra Energy on the basis that it contained sensitive proprietary information, such as projected load, terms of gas purchases, and gas pricing. Bangor Gas argued that such information was sensitive both to it, as an LDC, and to its supplier, because each operates in a competitive environment. Accordingly, BGC stated that a protective order was necessary to prevent this sensitive information from being used by competitors and potential competitors.

In its exceptions, Sprague asserts that it has seen no record evidence to support a finding that the contract terms are in the public interest. Sprague's view is restricted by the fact that detailed evidence concerning the gas supply contract terms and price have been determined to be proprietary and, thus, have not been disclosed to Sprague.

Because the public interest is served by having utility business conducted in as open a fashion as possible, we strive to minimize confidential treatment of information whenever possible. The determination of whether information requires confidential treatment requires a weighing of harms and benefits. We wish to review whether the gas supply contract information submitted in this proceeding warrants continued protection.

Accordingly, we direct Bangor Gas to restate the reasons in greater detail why it believes the gas supply contract information submitted by Bangor Gas in these proceedings should be afforded confidential treatment. In addition, we seek comment on the length of time such protection should be afforded, given that our practice is to release information once it is no longer sensitive. We are also interested in knowing what industry practices are in both regulated and competitive environments. We invite other parties to add their comments on these questions as well. BGC's comments are due March 15, 2001. Responsive comments are due March 26, 2001.

[7] Nothing we do here is intended to except BGC's marketing activities from the Unfair Trade Practices Act, 5 M.R.S.A. § 205-A et seq.

VIII. CONCLUSION

We approve BGC's proposed gas supply contract with its affiliate, Sempra Energy for its Winter 2000-2001 gas supplies. However, we direct the Company to seek its gas suppliers for future contracts or requirements through an open bidding process that includes Sprague Energy, or to explain, by March 15, 2001, why it is not sensible to go forward in that way.

We find that no further adjustment to Bangor Gas's CGA or tariffed Energy Charge is warranted this winter season. We also approve modification of Bangor Gas's tariff to alert customers that the energy charge is only an estimate and may vary. Bangor Gas should filed revised tariffs within 10 days of this order.

Finally, BGC should provide further explanation for the necessity and time frame for confidential treatment of its gas supply contract by March 15, 2001.

Dated at Augusta, Maine this 26th day of February, 2001.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: WELCH
NUGENT
DIAMOND

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.